Supreme Court, U.S.
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No. 89-44

In The

Supreme Court of the United States

October Term, 1988

DENNIS BURNHAM,

Petitioner,

vs.

CALIFORNIA SUPERIOR COURT,
COUNTY OF MARIN,

Respondent.

FRANCIE BURNHAM,

Real Party in Interest.

On Writ of Certiorari To The California Court Of Appeal, First Appellate District, Division Five

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May the State of California exercise personal jurisdiction over a non-resident where he is personally served with the Petition and Summons while physically present within that State during one of several recurring visits to that State?

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DECISIONS BELOW

The decisions of the California State Courts have been accurately set forth in the Appendices to the Petition for Writ of Certiorari filed in this Court, except that Appendix C (decision of the Court of Appeal) contains a clerical error. An accurate reproduction of the Court of Appeal decision is included herein as Appendix I. None of the decisions below have been published and, thus, there are no official citations.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment, United States Constitution:

> SECTION I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Code of Civil Procedure, section 410.10:

> A court of this state may exercise jurisdiction on any basis not inconsistent with the constitution of this state or of the United States.

JURISDICTION AND TIMELINESS

The jurisdiction of this Court in this matter is founded upon 28 U.S.C., section 1257 (3). The Petition for Writ

of Certiorari was received by Appellate Counsel for Real Party in Interest, Francie Burnham, on July 10, 1989. This Brief in Opposition to the Petition is timely filed on or before August 9, 1989 as provided in Rule 22.1 of the Rules of the Supreme Court of the United States.

STATEMENT OF THE CASE

Petitioner, Dennis Burnham, (hereinafter "Husband") and Real Party in Interest, Francie Burnham, (hereinafter "Wife") were married in 1976 and lived in the State of New Jersey from 1977 until they separated in 1987. In July of 1987, with Husband's consent and assistance, Wife and the two minor children born of the marriage moved from New Jersey to California where they have resided ever since. Husband purchased the airline tickets for Wife's and the children's flight to California and he drove them to the airport on the day of their departure.

Subsequent to Wife and the children's establishing their residence in California, Husband filed two separate divorce actions in New Jersey and both of those actions were dismissed by the New Jersey Superior Court. On July 24, 1989 both orders of dismissal were upheld on appeal. (Appendix II)

On January 5, 1988, Wife filed a Petition for Legal Separation in California and the Petition and Summons were personally served upon Husband in Mill Valley, California on January 24, 1988. At the time Husband was served, he was in California on one of his periodic trips to California. That particular trip had begun on January 18, 1988 when he was initially in Southern California on

business and then, later, flew to the San Francisco Bay Area to visit his children. Prior to that trip to California Husband had, most recently, visited California during the last week in October, 1987 (October 23, through October 30) at which time he *conducted* a business seminar on specialty advertising in the Napa Valley and then, on the weekend after the seminar, he attended his daughter's eighth birthday party in Marin County, California. He traveled to California again in December of 1987. During the months subsequent to his being served with Wife's Petition and Summons, Husband continued to make his periodic trips to California in which he both attended to his own personal and business affairs and spent some time visiting with his children. Evidence was submitted to the Superior Court that Husband had made at least one business trip to California each year during the entire eleven-year period of the parties' marriage, except for 1984. Husband has acknowledged taking advantage of tax benefits resulting from his business trips and activities in California.

In June of 1988 husband filed a Motion to Quash Service of the Summons and to dismiss the California proceedings and the Trial Court initially found that it had jurisdiction over the marital status but not over Husband *in personam*. On October 5, 1988, the Superior Court in California granted a reconsideration of its prior Order of September 8, 1988 and determined that it had personal jurisdiction over Husband. On November 4, 1988, the Superior Court denied Husband's Motion for Reconsideration of the October 5 Order. In the Trial Court Wife argued that California could properly exercise personal

jurisdiction over Husband both because he was personally served with process while present during one of his periodic trips to California and because under the particular facts of the case as presented to the Trial Court, Husband had sufficient minimum contacts with the State of California. On April 7, 1989 the California Court of Appeal denied Husband's Petition for Writ of Mandate which had been filed on November 8, 1988 and upheld the Superior Court's decision to exercise personal jurisdiction over Husband. Husband then filed a Petition for Review in the California Supreme Court, seeking review of both the personal jurisdiction issue and an issue of procedure relating to extraordinary writ practice under California State law. On June 8, 1989 the California Supreme Court denied the Petition for Review.

REASONS WHY PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

Shaffer v. Heitner Is Not Dispositive Of The Issue Presented In This Case

As husband recognizes in his Petition, *Shaffer v. Heitner* 433 U.S. 186 (1977) does not involve either personal jurisdiction over a non-resident or physical presence of a non-resident person within the boundaries of the forum state. In *Shaffer* the question was whether the forum state (Delaware) could exercise *quasi in rem* jurisdiction on the basis that a non-resident defendant's stock in a Delaware corporation was "present" within Delaware, by operation of law. This Court held that such a basis was not sufficient for the exercise of *quasi in rem* jurisdiction. In contrast, the present case raises an issue of

in personam jurisdiction under the circumstances that Husband, the non-resident respondent, was physically present in California not on just one occasion but on recurring occasions for a variety of purposes, both before and after service of process, as well as at the time of service. One of those purposes (visiting with his children) for which he was present in California on a number of different occasions, including the one during which he was served with process, is directly connected with the litigation in which he was served and which is the subject of the present proceedings in this Court. Thus, this case presents a far different factual and legal situation than that presented in *Shaffer*.

This case does not present a question of "mere" presence nor one of "casual" nor "momentary" nor "transitory" presence. Thus, this is not an appropriate case for this Court to consider whether such fleeting presence constitutes a sufficient basis for the exercise of personal jurisdiction. It is a settled proposition that this Court does not render advisory opinions nor does it decide abstract, hypothetical or contingent questions. It will not decide constitutional questions in advance of the necessity to do so or formulate a rule of constitutional law broader than is required by the precise facts to which its decision is to be applied. See *Alabama State Federation of Labor v. McAdory* 325 U.S. 450 (1944).

This Case Does Not Present An Unresolved Question Of Federal Law That Should Be Settled By This Court

To the extent that the language of *Shaffer v. Heitner* suggests reference to the standards developed during the regime of *International Shoe Co. v. Washington* 326 U.S. 310

(1945), those standards have been met. Under the evidence presented to the California courts in this case, the exercise of personal jurisdiction over husband is both reasonable and just, and is consistent with traditional conceptions of "fair play and substantial justice." *International Shoe, supra* 326 U.S. at 316, 317 and 320.

Kulko v. California Superior Court 436 U.S. 84 (1977), which Petitioner has cited several times, involved factual circumstances very different from those in the present case. Significantly, as pointed out by Husband in his Petition (page 14), *Kulko* did not involve an issue of exercise of jurisdiction based upon the husband's physical presence in the forum state. Further, *Kulko* involved post-decree proceedings initiated by the wife to reopen the question of the amount of child support payments to be made by the husband, some three and a half years or so after there had been a final divorce decree which incorporated the terms of a separation agreement which had settled the amount to be paid by husband for child support. Under those facts it was held to be not reasonable to require the husband to litigate the support increase issues in California.

In the present case, there has not been a divorce decree settling any issues and the validity and enforceability of the purported settlement agreement executed by Husband and Wife is in dispute and has yet to be adjudicated by any court, although both the trial judge and the appellate judges in New Jersey have expressly questioned the fairness of Husband's conduct and of the agreement itself.

In the present case, each time Husband visited California he was there purposefully and more than just briefly. There is a connection between his presence in California (at several different times) and the litigation in which he was served with process during one of those visits. That Wife might initiate proceedings in California after she and the children became residents of that state and that she might have him served with process relating to those proceedings while he was present in California was reasonably foreseeable by Husband and was "not so unpredictable as to be unfairly burdensome." *Amusement Equipment Inc. v. Mordelt* (5th Cir.1985) 779 F. 2d 264, 270. See also *Worldwide Volkswagen Corp. v. Woodson* 444 U.S. 282, 297 (1980). Under the particular facts of the present case, the exercise of personal jurisdiction over Husband is both fair and reasonable, not oppressive or unjust.

The decisions of the state courts are consistent with the prior decisions of this Court and this case does not present a question of federal law that should be settled by this Court.

The Decision Of The California Court Of Appeal Is Not In Conflict With The Decision Of Any State Court Of Last Resort Or A Federal Court Of Appeals

This case does not present a circumstance in which the California Court of Appeal decision is in conflict with the decisions of other state or federal appellate courts. None of the cases cited by Husband in his Petition involve factual circumstances similar to those here, where the evidence shows a continuing pattern of recurring visits to California by Husband. For example, in *Harold M. Pitman Co. v. Typecraft Software* (N.D. Ill. 1986) 626

F.Supp. 305, Defendant O'Connor was served with process on the *one and only time* he was in the State of Illinois for a three-day exhibition. Similarly, in *Amusement Equipment Inc. v. Mordelt, supra,* the non-resident defendant (Mordelt) was present in Louisiana only briefly for a trade show. In *Nehemiah v. Athletics Congress of U.S.A.* (3d Cir.1985), 765 F.2d 42 the question was whether the brief presence of its agent constituted the "presence" of an unincorporated association sufficient to impose personal jurisdiction over the association, a somewhat different question than the one presented in the present case. In any event, it is clear from the Court of Appeal's opinion in *Nehemiah* that the presence involved was indeed transitory. *Bershaw v. Sarbacher* (Wash. App. 1985) 700 P. 2d 347 was a paternity case involving an allegation that the non-resident putative father had been fraudulently lured into the State of Washington for the purpose of serving him with process (see 700 P.2d at page 348). In discussing the fact of the defendant's presence in Washington at the time of service, the court expressly noted that his was a "transient presence". (See 700 P.2d at page 349). In any event, *Bershaw* is inapposite on the ground that the statutory basis asserted under the Washington long arm statute was "The commission of a tortious act within this state" (see 700 P.2d at page 349), whereas the statutory basis under the California statute in this case is the "presence" of the defendant within the state.

The fact that the California courts on the facts of the present case found in favor of the exercise of jurisdiction, whereas the courts in the foregoing cases determined on the basis of markedly different factual circumstances that the exercise of personal jurisdiction was not proper, does

not amount to a conflict of the sort contemplated by Rule 17.1(b) of the Rules of the United States Supreme Court. Clearly, the cases cited by Husband at pages 10 and 11 of his Petition involve fleeting or transitory presence and this case does not.

Moreover, regarding the public policy of encouraging parental visitation, that is a state concern, not a matter to be addressed by this Court. The California courts have held that the exercise of personal jurisdiction over Husband under the facts of this case does not interfere with that State's public policy of encouraging parental visitation.

Granting Of Husband's Petition Would Result In A Substantial And Unjust Delay

Wife has contended throughout this case that Husband's jurisdictional challenge has not been undertaken in good faith but, rather, has been calculated to bring Wife to her knees and force her not only to capitulate on the jurisdictional issue and litigate the marital issues in New Jersey but also to accept the terms of the purported settlement agreement which, as the New Jersey Courts observed, was not negotiated from equal bargaining positions and provided for an unequal distribution of marital assets in favor of Husband. The record in this case establishes that, for more than a full year, Husband withheld all child and spousal support payments from Wife even though the purported New Jersey settlement agreement he claims is binding provided for such payments and even after, in contempt proceedings, the California Superior Court ordered him to make such payments. Husband

finally resumed payments to Wife only after the California Superior Court conditioned the granting of his request for a stay pending his Petition for Writ of Certiorari to this Court on his doing so. Husband has confirmed these facts in his Petition (pages 17-19).

California's Exercise Of Personal Jurisdiction Under The Facts Of This Case Is Proper Based Upon A Consideration Of The Relative Burdens On And Interests Of Both Parties And The Interests Of The Forum State

In determining the validity of the exercise of personal jurisdiction over a non-resident, it is appropriate to consider not only the relative burden on the defendant but also the interests of the plaintiff and of the forum state. *Asahi Metal Industrial Co. vs. California Superior Court*, 480 U.S. 102 (1987). California has a legitimate interest in providing a forum for the adjudication of legal issues involving its residents (wife and children) as long as doing so does not offend traditional notions of fair play and substantial justice. Based upon the evidence in this case, Husband clearly has a higher level of mobility and has established a habit of travelling to California even prior to the initiation of the separation proceedings. It is substantially more convenient for him to travel to California for purposes of litigation than for Wife, who has the day-to-day custody and responsibility of the two small children, to travel regularly to New Jersey. Husband has acknowledged that he has reaped tax benefits from his ability to schedule business activities in California and he can continue to do so in connection with his future trips to California to visit his children and to appear in judicial proceedings. Wife, on the other hand, being a homemaker

and mother, does not have the same advantage. It would be most burdensome to require Wife with two small children to fly back and forth between California and New Jersey to litigate issues which can just as easily and without any substantial unfairness to Husband be litigated and adjudicated in the California courts. Contrary to the suggestion of Husband, there has been no forum shopping by Wife. She has initiated judicial proceedings in the state in which she and the children reside, after moving there with Husband's consent and active participation.

CONCLUSION

For all of the reasons set forth herein and based upon all of the foregoing authorities, it is respectfully requested that this Court deny Husband's Petition for Writ of Certiorari.

Dated: August 7, 1989

Respectfully Submitted,

ROBERT L. NELSON
JAMES O. DEVEREAUX
Counsel of Record for
Real Party in Interest,
Francie Burnham

APPENDIX I

COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE
FIRST APPELLATE DISTRICT
DIVISION FIVE

DENNIS BURNHAM, Petitioner, v. SUPERIOR COURT, COUNTY OF MARIN, Respondent, FRANCIE BURNHAM, Real Party in Interest.	A044090 Marin County Superior Court No. FL1003 Filed APR -7 1989

BY THE COURT:

After full briefing and consideration of the issues raised therein, as well as the court's independent research, the petition for writ of mandate is denied. The court concludes that personal presence continues to be a valid jurisdictional predicate for *in personam* jurisdiction, and that *Shaffer v. Heitner* (1977) 433 U.S. 186 does not compel a contrary conclusion. As the trial court noted, no California or United States Supreme Court case has applied *Shaffer's* "minimum contacts" analysis to a defendant present in the forum state and personally served with process. Those cases which have considered the issue have ruled that *Shaffer* does not preclude a finding of personal jurisdiction based on presence. (See, e.g., *Amusement Equipment, Inc. v. Mordeldt* (5th Cir. 1985) 779

F.2d 264; *Aluminal Industries v. Newtown Commercial Assoc.* (S.D.N.Y. 1980) 89 F.R.D. 326; *Cariaga v. District Court* (Nev. 1988) 762 P.2d 886; *Oxmans' Erwin Meat Co. v. Blacketer* (Wis. 1979) 273 N.W.2d 285; see also *Donald Manter Co., Inc. v. Davis* (1st Cir. 1976) 543 F.2d 419.)

In light of the evidence presented to the trial court that petitioner's presence within California was for the dual purposes of visitation and conducting business activities, the imposition of personal jurisdiction in this case will not act to discourage parental visitation. (Cf. *Judd v. Superior Court* (1976) 60 Cal.App.3d 38, 45.)

Dated APR - 7 1989

King, J.

ACTING P.J.

APPENDIX II

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-1522-88T2
A-5705-87T2

DENNIS BURNHAM,

Plaintiff-Appellant,

v.

FRANCIE BURNHAM,

Defendant-Respondent.

ORIGINAL FILED
JUL 24 1989

Argued June 6, 1989 - Decided July 24, 1989

Before Judges Antell and Brochin.

On appeal from Superior Court, Chancery Division, Family Part, Sussex County.

Laurence J. Cutler argued the cause for appellant (Cutler & Celli, attorneys; Mr. Cutler, on the brief).

Ann O'Flanagan argued the cause for respondent.

PER CURIAM

Following execution by the parties of a property settlement agreement on July 8, 1987, defendant wife moved to California with the two children of the marriage. The move was made with the acquiescence of plaintiff husband who, in fact, paid for the cost of transportation. Plaintiff filed his complaint for divorce in New Jersey on October 7, 1987, but did not serve defendant with process

at this time. Defendant started suit in California against plaintiff for legal separation, custody and child support on January 5, 1988, and plaintiff was served by mail with the papers in that case on January 24, 1988. He was also personally served while on a business trip in that state.

After being served with the California suit papers, plaintiff, for the first time, made extraterritorial service on defendant of his New Jersey summons and complaint on January 30, 1988.

Plaintiff here appeals from an order dated June 3, 1988, dismissing the complaint which he filed in New Jersey on October 7, 1987. He also appeals from an order dated October 14, 1988, dismissing his second complaint for divorce and incorporation of the property settlement agreement, which he filed after the dismissal of his first complaint. We have consolidated both appeals for the purpose of review.

The determination of the Chancery Division to foreclose plaintiff from pursuing his claim for relief in New Jersey was grounded in the belief that plaintiff had deliberately and unfairly manipulated defendant into moving to California so that he could bring his divorce action in New Jersey where it would be the most convenient for him and most inconvenient for defendant, upon the fact that plaintiff failed to issue his summons within ten days after filing the complaint as required by R. 4:37-2(a), upon considerations arising from the Uniform Child Custody Jurisdiction Act, *N.J.S.A.* 2A:34-35, and upon considerations of *forum non conveniens*.

We affirm both orders under review substantially for the reasons stated by Judge Graves for the Chancery

Division, Family Part, in his detailed and comprehensive statement of reasons filed with the order of June 3, 1988.